STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal From The Michigan Court of Appeals
Honorable Bill Schuette, Presiding

HARTMAN & EICHHORN BUILDING CO., INC., a Michigan corporation,
Plaintiff/Counterdefendant,

v

STEVEN DAILEY and JANINE DAILEY, a married couple; and ABN-AMRO d/b/a STANDARD FEDERAL BANK, jointly and severally,
Defendants,

and

STEVEN DAILEY and JANINE DAILEY,
Counterplaintiffs/Third-Party Plaintiffs/Appellees,
v

JEFFRY R. HARTMAN, an individual,
Third-Party Defendant/Appellant.

Supreme Court Docket No. 129733

Court of Appeals Docket No. 249847

Oakland County Circuit Court
Case No. 01-032203-CK

BRIEF ON APPEAL
OF APPELLANT, JEFFRY R. HARTMAN

ORAL ARGUMENT REQUESTED

Robert S. Rollinger (P27237)
ROBERT S. ROLLINGER, P.C.
Attorney for Plaintiff/Counterdefendant and Third-Party Defendant/Appellant
30500 Northwestern Hwy., Ste. 500
Farmington Hills, MI 48334
(248) 626-1133

TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES

CASES **Page**

STATUTES

COURT RULES

QUESTIONS PRESENTED

I. ARE LICENSED RESIDENTIAL BUILDERS, WHOSE CONDUCT IS BOTH AUTHORIZED BY AND REGULATED BY THE STATE OF MICHIGAN PURSUANT TO THE MICHIGAN OCCUPATIONAL CODE, MCL 339.101 *et seq*, EXEMPT FROM LIABILITY UNDER THE MICHIGAN CONSUMER PROTECTION ACT WHEN THEY ARE ENGAGED IN A REGULATED ACTIVITY?

Third-Party Defendant/Appellant, Jeffry R. Hartman, answers "Yes."

Defendants/Counterplaintiffs/Appellees, Steven and Janine Dailey, answer "No."

The Michigan Court of Appeals answered "No."

The trial court, it is assumed, would answer "Yes."

II. ARE THE CORPORATE OFFICERS OF LICENSED RESIDENTIAL BUILDERS PERSONALLY LIABLE FOR CLAIMS UNDER THE MICHIGAN CONSUMER PROTECTION ACT?

Third-Party Defendant/Appellant, Jeffry R. Hartman, answers "No."

Defendants/Counterplaintiffs/Appellees, Steven and Janine Dailey, answer "Yes."

The Michigan Court of Appeals answered "Yes."

The trial court answered "No."

STATEMENT OF JURISDICTION AND RELIEF REQUESTED

On October 24, 2005, Third-Party Defendant/Appellant, Jeffry Hartman ("Hartman"), filed his Application for Leave to Appeal, appealing the May 26, 2005 Court of Appeals' opinion reversing the circuit court's Opinion and Order granting summary disposition in favor of Hartman and the September 13, 1005 Court of Appeals' Order denying his Motion for Reconsideration pursuant to MCR 7.301(A)(2) and 7.302(C)(2)(c). By Order dated May 4, 2006, Hartman's Application for Leave to Appeal the May 26, 2005 Court of Appeals' opinion was granted – "limited to the questions involving the Michigan Consumer Protection Act's application to residential builders." Hartman is asking this Court to reverse the Court of Appeals and reinstate the trial court's Opinion and Order granting him summary disposition. Hartman is requesting that this Court, consistent with its decision in *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999), rule that residential builders, licensed by the State of Michigan, are exempt from claims under the Michigan Consumer Protection Act ("MCPA") when they are engaged in a regulated activity.

I. SUMMARY OF ARGUMENT

This appeal involves, primarily, a straightforward legal issue: whether licensed residential builders, while engaged in a regulated activity, can be held liable for alleged violations of the Michigan Consumer Protection Act, MCL 445.901, *et seq* (the "MCPA"). Resolution of this issue involves legal principles of major significance in this State's jurisprudence; that is, application of the MCPA to hundreds of thousands of entities throughout the State which are regulated by the State. More importantly, if permitted to stand, the published Court of Appeals Opinion in this case, ruling that residential builders are not exempt, is in direct conflict with this Court's decision in *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999).

In *Smith*, this Court held that the exemption under the MCPA applies so long as the "general transaction" at issue is authorized by law, even though the legality of the defendant's conduct in performing the transaction might be the subject of dispute. *Smith*, 460 Mich at 465-466. Thus, under this Court's decision in *Smith*, the exemption under the MCPA applies where the general transaction in question was authorized by laws administered by a regulatory board or officer of this State. Under *Smith*, the focus is placed on the authorized nature of the "general transaction" rather than the alleged "specific misconduct."

Pursuant to the applicable provisions of the Michigan Occupational Code. MCL 339.101, *et seq* (the "Code"), licensed residential builders are regulated. Therefore, when engaging in activities regulated by the Code, residential builders are exempt from liability under the MCPA pursuant to MCL 445.904(1)(a). The conduct at issue here (that

is, the "general transaction") is the construction of a residence – a regulated activity. Accordingly, that Hartman is exempt under the MCPA in this case is a conclusion mandated by this Court's holding in *Smith*.

That notwithstanding, in a published opinion, the Court of Appeals held that Hartman, a licensed residential builder, was not exempt under the MCPA. The Court of Appeals stated:

> This leaves us with Hartman's appellate argument that the MCPA does not apply to actions taken by him or HEBC because the act of a building contractor repairing a house is regulated by the Occupational Code. **We agree, but we are bound by precedent to hold otherwise.** According to MCL 445.904(1), the MCPA "does not apply to . . . [a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state . . . ." In *Smith, supra* at 465, our Supreme Court liberally interpreted the phrase "transaction or conduct specifically authorized" to include any activity or arrangement permitted by statute. The Court did not limit the scope of the inquiry to the specific misconduct alleged. *Id.* Therefore, if a statute authorizes the performance of some service by a licensed professional, then the MCPA does not apply to the professional's performance of the service. *Smith, supra* at 465–466, n 12.
>
> **Applying *Smith* to this case, we would find that the statutes allow only licensed residential builders or alteration contractors to perform the reconstruction work at issue here,** MCL 339.601(1), 339.2401, 339.2404, and Hartman held the license for HEBC in accordance with MCL 339.2405. Therefore, Hartman and HEBC were generally allowed by statute to make the repairs and renovations to the Daileys' home, and the MCPA should not apply. **However, in *Forton, supra* at 715, we expressly held that residential builders are subject to the MCPA. While we question the wisdom of either *Smith* or *Forton*, we are bound by MCR 7.215(J)(1) to apply *Forton* and hold Hartman accountable under the MCPA.** As with the fraud claims,

> the trial court did not address the merits of the Daileys' MCPA claims, so we reverse the court's grant of summary disposition and remand for further proceedings.

See, Court of Appeals Opinion, May 26, 2005 ("5/26/05 Opinion"), pp 4-5 (emphasis supplied), Appendix, pp 41a-42a.

Accordingly, the Court of Appeals declared a conflict between its prior opinion in *Forton v Laszar*, 239 Mich App 711; 609 NW2d 850 (2000), lv den 463 Mich 969 (2001) and this case. However, the Court of Appeals denied the convening of a special panel. See, Court of Appeals Order, June 22, 2005 ("6/22/05 Order), p 1, Appendix, p 46a. Hartman then filed a Motion for Reconsideration on July 13, 2005. Court of Appeals Docket Entries, Appendix, p 28a.

In ruling on the Motion for Reconsideration, significantly, all three Court of Appeals judges agreed that, contrary to *Forton*, the MCPA does not apply to building contractors. The Court of Appeals, two to one, nonetheless denied the Motion for Reconsideration, stating:

> The Court orders that the motion for reconsideration is DENIED. Judges Schuette and Sawyer, while voting to DENY the motion for reconsideration, agree that the Michigan Consumer Protection Act (MCPA) does not apply to building contractors and that the **resolution of this issue is best determined on appeal to the Michigan Supreme Court** or by a case that was not subject to a conflict panel pursuant to MCR 7.215.

See, Court of Appeals Order, September 13, 2005 ("9/13/05 Order"), p 1 (emphasis supplied), Appendix, p 47a.

By contrast, Judge O'Connell would have granted the Motion for Reconsideration. Judge O'Connell stated that where all three panel members agree that the MCPA does not apply to residential builders, "logic dictates that the motion for reconsideration should be granted." See, 9/13/05 Order, p 1, Appendix, p 47a.

The Court of Appeals expressly acknowledged that this Court's holding in *Smith* compels the conclusion that licensed residential builders are exempt from liability under the MCPA. In fact, the Court of Appeals would have found this to be the case but for its perception that a conflict existed between its own opinion and the opinion in *Forton*, *supra*. However, the real conflict that exists is the one between this Court's decision in *Smith* and the Court of Appeals' published opinion in this case. For this reason alone, this Court should reverse the decision of the Court of Appeals.

In addition, as discussed below, recent Court of Appeals decisions on this precise issue have produced inconsistent results – some panels have followed *Smith*, while others have not – as is the case here. Prior to this case, the state of the law in lower court decisions on the application of the MCPA to regulated professional entities was haphazard. Now, however, as a result of the published Court of Appeals decision in this case, in direct conflict with *Smith*, the case law is irreconcilable. Absent action by this Court, members of State regulated industries will be subjected to "flip of the coin" verdicts in civil actions.

Moreover, this case, filed in 2001, illustrates that protracted circuit court litigation does not provide a more effective remedy than the State of Michigan administrative process and is contrary to the very intent of the MCPA exemption. If properly applied, the exemption would result in these types of cases being decided in administrative proceedings

before the proper regulatory board. Regulatory boards are comprised to have the "built-in" expertise necessary to resolve professional service disputes. Moreover, the consumer does not need to hire an attorney, since the Department effectively "prosecutes" the dispute on the claimant's behalf. All of the Department's services are free to the consumer.

Finally, resolving disputes between consumers and regulated entities through the Department's administrative process eliminates the possibility that the regulated entity is subject to liability in multiple forums for the same claims. Where a complaint is filed with the Department, a residential builder is subject to the following penalties: (1) placement of a limitation on a license or certificate of registration; (2) suspension of license; (3) denial of license; (4) revocation of license; (5) Ten Thousand ($10,000.00) Dollars; (6) censure; (7) probation; and (8) a requirement that restitution be made. MCL 339.602; MSA 18.425(602). The builder is likewise subject to money damages in a civil suit. If left to stand, the Court of Appeals' 5/26/05 Opinion will subject residential builders to liability for the same claims, in multiple forums, with duplicative and/or varied outcomes/verdicts. This increased liability can only translate into increased costs for residential housing. Public policy favors reversal.

The second issue presented in this Application is one of first impression; namely, the personal liability of corporate officers under the MCPA. The Court of Appeals construed the statutory provisions of the MCPA to find individual liability of corporate officers notwithstanding that the individual was acting solely in his capacity as a corporate officer and the acts complained of occurred in the context of that officer contracting with Defendants on behalf of a disclosed principal. The impact to business owners everywhere in the State is obvious if the Court of Appeals' Opinion is permitted to stand.

II. STATEMENT OF FACTS

A. Background Facts

This case arises out of a Building Agreement for residential construction between Plaintiff/Counterdefendant, Hartman & Eichhorn Building Co., Inc. ("HEBC") and Defendants/Counterplaintiffs/Third-Party Plaintiffs/Appellees, Steven and Janine Dailey (the "Daileys"). Third-Party Defendant/Appellant, Jeffry R. Hartman ("Hartman") is President and Qualified Officer of HEBC. Both Hartman and HEBC were, at all times relevant, residential builders, licensed and regulated by the State of Michigan. See, License Verifications, Appendix, pp 200a-201a.

The Building Agreement between HEBC and the Daileys was for the renovation and addition to the Daileys' home. See, Building Agreement, 5/30/00, Appendix, pp 202a-204a. According to a Building Agreement Addendum signed by the Daileys and HEBC, the Daileys would make regular payments as each construction stage was reached. See, Addendum 1 to Building Agreement, 6/22/00, Appendix, p 205a. The Building Agreement the Daileys signed also contained a provision that its terms, along with the plans and specifications, represented the sole representations and obligations of the parties; i.e., an integration clause. See, Building Agreement, p 3, Appendix, p 204a. Hartman's signature is on the Building Agreement as HEBC's representative. See, *id*. The Project Specification Information also has Hartman's signature as "Builder's Agent." See, Project Specification Information, 5/11/02, p 6, Appendix, pp 206a-210a. Both the Building Agreement Addendum and the Project Specification Information were prepared on HEBC stationery. Appendix, pp 205a-210a.

After the construction commenced, the Daileys became dissatisfied with HEBC's work and ceased making the regular payments required by the Building Agreement. HEBC filed a cause of action against the Daileys for breach of contract and related claims. See, HEBC's Complaint, 5/31/00, Appendix, pp 78a-101a. The Daileys responded with a Countercomplaint against HEBC for breach of contract, fraudulent misrepresentation, and MCPA violations, among other claims not relevant to this appeal. Further, the Daileys filed a Third-Party Complaint against Hartman individually for similar claims. See, the Daileys' Countercomplaint and Third-Party Complaint, 6/26/01, Appendix, pp 102a-195a. In addition to the Daileys' circuit court lawsuit, the Daileys filed a complaint with the Michigan Department of Consumer and Industry Services, now the Department of Labor and Economic Growth (the "Department"), the licensing and regulating authority. See, State of Michigan Complaint, 8/29/02, Appendix, pp 211a-228a. A formal complaint was issued by the Department against HEBC and Hartman. See, *id*. Thus, the Daileys filed the same claims, based on the same facts, against the same defendants, in two different forums.[1]

In the circuit court, the Daileys alleged that during the course of construction, Hartman made certain misrepresentations as to future events and/or construction conditions, thereby violating the MCPA. See, Third-Party Complaint, ¶¶ 89-93, Appendix, p 114a. The misrepresentations that formed the basis of the MCPA claims were alleged by the Daileys

---

[1] The proceedings before the Department have been resolved through payment of a fine and license suspensions. Restitution was not ordered in the administrative proceeding, but only because this lawsuit was pending. See, Stipulation, ¶ 4, Appendix, pp 196a-199a. It was well within the power of the Department to order restitution should it have chosen to do so. MCL 339.602. In all events, the point is that Hartman and HEBC were pursued for the same thing, by the same people, in two different forums and were, and are, subject to double liability/penalties.

to be agreements between the parties that occurred subsequent to, and outside of, the original Building Agreement. See, *id*. and ¶ 78(b) ("he [Hartman] represented that the . . . 24[] items . . . *would be completed if* . . . ").

In response, Hartman argued on summary disposition that in performing construction work pursuant to the Building Agreement with the Daileys, he acted exclusively in his capacity as an officer of HEBC, and never acted in an individual capacity. See, Affidavit of Jeffry R. Hartman, 8/14/02, ¶¶ 2-3, Appendix, p 230a, and Checks from Daileys **to HEBC**, Appendix, pp 128a-135a. In addition, Hartman cited the deposition of Steven Dailey, in which Mr. Dailey conceded that the Building Agreement was with HEBC only, not Hartman individually. See, Deposition of Steven Dailey, 10/4/02, p 155, Appendix, p 233a.

Moreover, the MCPA exempts "[a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state . . . ." MCL 445.904(l)(a). A licensed residential builder like Hartman, while engaged in the general transaction of the construction, maintenance and/or alteration of homes, is regulated by the Occupational Code (the "Code") as administered by the Residential Builders and Maintenance and Alterations Contractors Board (the "Board") of the Department. Thus, the MCPA exempts Hartman from any liability in this case.[2]

---

[2] The Daileys argued in their response to Hartman's Motion for Reconsideration in the Court of Appeals that the issues of the MCPA exemption and the precedential effect of *Forton v Laszar*, 239 Mich App 711; 609 NW2d 850 (2000), lv den 463 Mich 969 (2001), were not properly raised on appeal. See, Appellants' Response in Opposition, 7/21/05, pp 2-3. On the contrary, the Daileys' counsel himself raised these issues at the hearing before the circuit court on Hartman's Motion for (continued...)

B. Procedural History

On cross-motions for summary disposition, the Trial Court ruled, in relevant part to this appeal, that the Daileys' claims against Hartman individually for MCPA violations were dismissed because, when dealing with the Daileys, Hartman acted exclusively on behalf of HEBC. See, Trial Court Opinion and Order, 12/12/02, Appendix, pp 31a-37a. The Trial Court subsequently denied the Daileys' Motion for Reconsideration on January 9, 2003.

After granting the Daileys' Delayed Application for Leave to Appeal concerning the claims against Hartman only, the Court of Appeals issued a split Opinion. See, 5/26/05 Opinion, Appendix, pp 38a-45a. The panel majority declared a conflict with *Forton v Laszar*, 239 Mich App 711; 609 NW2d 850 (2000), lv den 463 Mich 969 (2001), pursuant to MCR 7.215(J), for the stated reason that, "if we were not bound by [*Forton, supra*], we would hold that the MCPA does not apply to the performance of residential construction, renovation or repair by licensed residential builders." See*, id*. at slip op, p 2.

(...continued)

Summary Disposition, arguing that the threshold question of law before determining whether Hartman is individually liable under the MCPA is whether the MCPA applies to residential contractors under *Forton*, *supra*. See, Summary Disposition hearing transcript, 11/20/02, pp 20-21, Appendix, pp 68a-69a. See, *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443-444; 695 NW2d 84 (2005), lv den 474 Mich 956 (2005) (an issue is preserved if raised and decided by a court; further, an appellate court may decide the issue anyway if the necessary facts have been presented). Moreover, and most importantly, the Court of Appeals decided this issue in a published opinion.

The Court of Appeals also held that the MCPA is applicable to individuals like Hartman in addition to entities. 5/26/05 Opinion, pp 3-4, Appendix, pp 40a-41a.[3]

On June 22, 2005, the Court of Appeals issued another split decision, and declined to convene a conflict panel to resolve the conflict between the present case and *Forton*, *supra*, because "the conflict is not outcome-determinative." See, 6/22/05 Order, Appendix, p 46a. Hartman filed a timely Motion for Reconsideration, and the panel unanimously agreed that the MCPA exemption applied and the MCPA did not apply to residential contractors.[4] See, 9/13/05 Order, p 1, Appendix, p 47a. Yet, the Court of Appeals majority denied relief, stating that "the resolution of this issue is best determined on appeal to the Michigan Supreme Court or by a case that was not subject to a conflict panel pursuant to MCR 7.215." See*, id*.

Therefore, Hartman filed a timely Application with this Court for the reason that *Forton* does not apply[5] and, following this Court's controlling decision in *Smith v Globe*

---

[3] Judge Sawyer, concurring in part and dissenting in part, would have determined that there is no individual liability for Hartman on the MCPA claim and would not have reached the issue whether *Forton, supra*, was correctly decided. See, 5/26/05 Opinion, p 1 (Sawyer, J., concurring in part and dissenting in part), Appendix, pp 43a-45a.

[4] Judge O'Connell stated in dissent: "All three panel members . . . agree that the MCPA does not apply to residential builders or alteration contractors. Therefore, in my opinion, logic dictates that the motion for reconsideration should be granted. However, . . . inexplicably, there exists only one vote to grant the motion. I believe it would be a waste of judicial resources to deny this motion for reconsideration because any recovery below based on MCPA grounds will undoubtedly face another more successful challenge in this Court." See, Court of Appeals Order Denying Reconsideration, 9/13/05, p 1, Appendix, p 47a.

[5] To the extent that *Forton* does apply, it should be overturned by this Court.

Life Ins Co, 460 Mich 446; 597 NW2d 28 (1999), and cases subsequent to *Smith*, this Court should rule that licensed residential builders are exempt from MCPA claims when engaged in a regulated activity. Moreover, as will be explained below, Hartman may not be held personally liable under the MCPA.

III. ARGUMENT

A. As A Matter Of Law, Licensed Residential Builders Are Exempt From Liability Under the MCPA

1. Standard Of Review

The standard of review in this matter is de novo as it involves the interpretation and application of a statute. See, *McJunkin v Cellasto Plastic Corp*, 461 Mich 590, 596; 608 NW2d 57 (2000), citing *Lincoln v General Motors Corp*, 461 Mich 483, 489-490; 607 NW2d 73 (2000).

2. *Smith v Globe Life Ins Co* Is Dispositive Of This Issue

Under Section 4(1)(a) of the MCPA, the MCPA does not apply to "[a] transaction or conduct specifically authorized under laws administered by a regulatory board . . . ." (the "Exemption"). MCL 445.904(1)(a). The scope of the Exemption is controlled by this Court's decision in *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999). In *Smith*, this Court held that so long as the "general transaction" at issue is authorized by law, the exemption applies, even though the legality of the defendant's conduct in performing the transaction might be the subject of dispute. *Smith*, 460 Mich at 465-466.

More specifically, in *Smith*, the plaintiff claimed violations of the MCPA by the defendant insurance company through the making of numerous misrepresentations about a policy of credit life insurance purchased by the plaintiff's decedent. *Smith, supra*, 460 Mich at 450-451. The Court of Appeals held that the Exemption did not apply because the legislature did not intend to exempt illegal conduct from coverage under the MCPA. *Id*. at 453. This Court reversed, stating:

> When the Legislature said that transactions or conduct specifically authorized by law are exempt from the MCPA, it intended to include conduct the legality of which is in dispute.

Id. at 465. This Court further explained that "the relevant inquiry is not whether the specific misconduct alleged by the plaintiffs is specifically authorized. Rather, it is whether the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited." *Id*. at 465-466 (footnotes omitted).

Accordingly, the Exemption under the MCPA applies whenever the general transaction in question is authorized by laws administered by a regulatory board or officer of this State. Residential builders, when engaged in the construction or alteration of a home, are regulated by the Code as administered by the Board. The Board promulgates rules which set minimal standards of practice, interprets licensure and registration requirements, and assesses penalties for violating the Code or rules. See, MCL 339.307 – MCL 339.317. Among those things prohibited by the Code, and most relevant to this case, are: Failing to perform a contract in a workmanlike manner and failing to comply with the applicable building code. MCL 339.2411(2). In addition, among other things, the Code also prohibits fraud, dishonesty and false advertising. MCL 339.604. In general, only a person who has

a valid residential builder's license may lawfully engage in the practice of residential building. See, MCL 339.601(1); MCL 339.2403. Here, it is undisputed that, at all times relevant, HEBC and Hartman were licensed residential builders subject to regulation under the Code. See, License Verifications, Appendix, pp 200a-201a.

In this case, the general transaction at issue was the construction of an addition to the Daileys' home by HEBC and/or Hartman – both of whom are residential builders. As such, the general transaction at issue is specifically authorized under laws administered by a regulatory board. And, Hartman and HEBC were undisputably regulated by the State. Therefore, the trial court correctly dismissed the MCPA claims.[6]

3. The *Forton* Decision Does Not Apply

As indicated, the Court of Appeals felt constrained by its own decision in *Forton* to hold that residential builders are not exempt under the MCPA. However, *Forton* does not apply to this case.

In *Forton*, plaintiffs claimed that defendant, builder, failed to construct the home in a "good and work-like manner," and deviated from the parties' plans and specifications without plaintiffs' knowledge or consent. Plaintiffs' legal theories were breach of contract and violations of the MCPA. There, the "general transaction" engaged in by the defendant was the building and sale of a new residential home and was regulated by the Department. The Court of Appeals found defendant liable under the MCPA. Following this published opinion, the defendant raised the Exemption for the first time in a motion for

---

[6] Where the trial court reaches the correct result, even if on a different basis, the decision will be upheld. *In re Powers*, 208 Mich App 582, 591; 528 NW2d 799 (1995).

rehearing before the Court of Appeals. Accordingly, the Court of Appeals in *Forton* did not, and could not, in its primary opinion, find the defendant builder to be exempt under the MCPA. Quite simply, the issue was never presented to the Court of Appeals until after it issued its published opinion. *Forton*, 239 Mich App at 716-717.

Following the Court of Appeals' denial of defendant's motion for rehearing in *Forton*, the defendant filed an application for leave to appeal with this Court. The application was denied. See, *Forton v Laszar*, 463 Mich 969; 622 NW2d 61 (2001). However, in relevant part, Justice Corrigan observed:

> Subsection 4(1)(a) of the MCPA provides that the MCPA "does not apply" to "[a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." Defendant now contends that his sale to plaintiffs comes within this exemption because he is a residential builder licensed and regulated under the Michigan Occupational Code, M.C.L. § 339.101 *et seq*; MSA 18.425(101) *et seq*. Of particular importance, argues defendant, is article 24 of the Occupational Code, which prohibits residential builders from departing from plans without consent. See M.C.L. § 339.2411(2)(d); MSA 18.425(2411)(2)(d). In *Smith, supra*, we explained that the words "transaction or conduct" in subsection 4(1)(a) of the MCPA referred to the general transaction at issue rather than the specific misconduct alleged. We then held that subsection 4(1)(a) exempted the sale of credit life insurance from the MCPA, because (1) the sale of credit life insurance was specifically authorized under the state laws governing the sale of insurance, and (2) those laws were administered by the Insurance Commissioner. Arguably, the logic of *Smith* would apply equally to defendant's sale of a residential home, because (1) portions of the Occupational Code regulate the conduct of residential builders, and (2) residential builders are regulated by the Residential Builders' and Maintenance and Alteration Contractors' Board.

Forton, supra, 463 Mich at 970 (Opinion of Corrigan, J.).

Therefore, the Court of Appeals' decision in *Forton* is distinguishable from the present case – quite simply, it did not consider the Exemption at all. By contrast, here, the Court of Appeals considered the Exemption, but failed to apply it, having believed that *Forton*, although incorrectly decided, required reversal of the trial court's grant of summary disposition in favor of Hartman.

This distinguishing feature of *Forton* was expressly discussed, acknowledged and relied upon by a different panel of the Court of Appeals in *Shinney v Cambridge Homes, Inc*, 2005 WL 415492 (Mich App, February 22, 2005). There, the Court of Appeals held that the Exemption to the MCPA applied to residential builders, stating:

> This Court has held that "residential builders are subject to claims of unfair or deceptive trade practices under the MCPA" because "the definition of 'trade or commerce' [in MCL 445.903(1)] includes residential builders who construct and sell homes for personal family use." *Forton v. Laszar,* 239 Mich.App 711, 715; 609 NW2d 850 (2000). **However, this Court did not address the application of MCL 445.904(1)(a) to a residential builder.**
>
> [Defendant] is authorized to build residential structures for payment from another. MCL 339.2401(a). The home purchase agreement explains that Cambridge agreed to do so. Because Cambridge engaged in a "general transaction [ ] specifically authorized by law," *Smith, supra* at 465, the transaction was exempt from the MCPA under MCL 445.904(1)(a). Accordingly, we hold that the trial court correctly ruled that Cambridge is immune to the imposition of attorney fees.

Shinney at p 3 (emphasis supplied). See, *Shinney* decision, Appendix, pp 234a-236a.

Again, *Forton* did not compel reversal of the trial court's opinion. In fact, *Forton* should be overruled to the extent it is inconsistent with this Court's Opinion in *Smith*.

4. The *Winans* Decision And Other Recent Court Of Appeals Decisions Are Persuasive And Follow This Court's Decision in *Smith v Globe*

In *Winans v Paul and Marlene, Inc*, 2003 WL 21540437 (Mich App, July 8, 2003), the homeowners sued defendant builder following defendant's construction of their home, claiming two violations of the MCPA – failing to repair the home, thereby causing a misunderstanding by plaintiffs of their legal rights, and deceptively representing the quality of construction performed on the home, as evidenced by the leaking basement. The Court of Appeals, however, followed *Smith* and expressly held that licensed residential builders are exempt under the MCPA, stating:

> We think that *Smith* makes it clear that we look to the general transaction involved, not the specific action which plaintiff alleges violates the MCPA. Here, the general transaction was the construction of a residence on plaintiffs' lot, which is regulated. That is to say, while the actions in *Diamond Mortgage* of writing mortgages was not the type of activity for which one needs a real estate broker's license, the actions in the case are [sic] bar are those of someone who needs a residential builder's license.

Winans, at p 4. See, *Winans* decision, Appendix, pp 237a-246a. Accordingly, *Winans* demonstrates that when *Smith* is properly applied and followed, licensed home builders are exempt under the MCPA when engaged in the construction or alteration of a residence.

Further, recent published decisions of the Court of Appeals have applied *Smith* and found defendants exempt from MCPA claims where the general conduct involved

in the case was regulated and specifically authorized under laws administered by a regulatory board. For example, in *Dressel v Ameribank*, 247 Mich App 133; 635 NW2d 328 (2001), rev'd on other grounds 468 Mich 557 (2003), the Court of Appeals analyzed the Exemption as it applies to lending practices of a bank. The Court found that the bank's conduct was exempt, relying on *Smith* and stating:

> The *Smith* court concluded that the defendant insurance company's general transactions were specifically authorized by law and, accordingly, were exempt from the MCPA. Similarly, defendant in the instant case was specifically authorized by law to make loans, MCL § 487.3401, and was regulated by the financial institutions bureau of this state as well as federal authorities, MCL § 445.1601 et seq.

Dressel, 247 Mich App at 146 (citations and footnotes omitted).[7]

Additional recent published decisions of the Court of Appeals applying *Smith* include the following: *Kraft v Detroit Entertainment*, 261 Mich App 534; 683 NW2d 200 (2004) ("[W]e conclude that the general conduct involved in this case – the operation of slot machines – is regulated and was specifically authorized by the [Michigan Gaming Control Board] . . . . Therefore, MCL 445.904(1)(a) applies in this case and defendants are exempt from plaintiff's MCPA claims."); *Newton v Bank West*, 262 Mich App 434; 686 NW2d 491 (2004) ("[U]nder the facts of this case, the MCPA claims fail as a matter of law because the residential mortgage loan transactions are exempt."); *Cowles v Bank West*, 263 Mich App 213; 687 NW2d 603 (2004), lv gtd 474 Mich 886 (October 19, 2005) ("[B]ecause the

---

[7] Notwithstanding the Court's holding that the exemption applied, the *Dressel* Court did rule that plaintiff's cause of action could move forward, but, pursuant to recent amendments of the Savings Bank Act. *Dressel*, 247 Mich App at 146.

[residential mortgage loan] transactions are exempt from the provisions of the MCPA, summary disposition on those claims was appropriate.").

Finally, in several unpublished decisions, the Court of Appeals relied on *Smith*, *Kraft* and/or *Newton* and held that defendants were exempt from the MCPA under Section 4(1)(a) where the general transaction at issue is authorized under laws administered by a regulatory board. Most recently, in *Mansoori v Birmingham Imports, Inc*, 2006 WL 794893 (Mich App, March 28, 2006), unpublished opinion per curiam of the Court of Appeals, the Court of Appeals addressed a case arising out of an auto lease agreement. When the lease term ended, there was a deficiency owed by the plaintiff customer. The plaintiff sued the bank and the dealer for fraud, negligence and MCPA violations. The trial court dismissed the MCPA claim and the Court of Appeals declined to reinstate it, stating that the MCPA does not apply to "transactions or conduct specifically authorized under laws administered by a regulatory board . . . ." *Mansoori, supra*, at p 2, citing *Smith v Globe*. The Court of Appeals held that in determining whether a transaction is within the scope of the MCPA, rather than reviewing the specific misconduct for specific authorization, the general transaction should be reviewed. In this case, the Court of Appeals held that the general transaction was a lease agreement and noted that the bank is subject to the United States Office of the Comptroller of the Currency under the National Bank Act. Thus, the transaction at issue was specifically authorized under those regulatory laws and that Board and was exempt from the MCPA. *Mansoori*, *supra*, at p 2. Appendix, pp 247a-249a.

Similarly, in *Richardson v Flagstar Bank, FSB,* 2006 WL 664336 (Mich App, March 16, 2006), unpublished opinion per curiam of the Court of Appeals, property owners

brought an action against a lender, title company and a bank arising out of the deposit of advances from the lender into the contractor's account for certain work performed. The theory was that the lender violated the MCPA and the loan agreement by not securing the owners' signatures on the disbursements. However, the Court of Appeals disagreed, stating that the bank was exempt from the MCPA under MCL 445.904(1)(a) because it does not apply to the lending activity of banks. *Richardson, supra*, at p 3, citing *Newton v Bank West*, 262 Mich App 434 (2004). Appendix, pp 250a-253a.

On the same date, the Court of Appeals issued its opinion in *McEntee v Incredible Technologies, Inc*, 2006 WL 659347 (Mich App, March 16, 2006), unpublished opinion per curiam. *McEntee* was an action to recover monies lost through gambling in an arcade game, brought partly under the MCPA. The Court of Appeals noted initially that the Michigan Gaming Control and Revenue Act would control the action because the Legislature vested the Michigan Gaming Control Board with jurisdiction over licensing, regulating and monitoring of the non-Indian casino industry. However, the Court of Appeals further held that the plaintiffs did not have so-called "standing" to bring the action under the MCPA because the MCPA expressly exempts transactions or conduct specifically authorized under laws administered by a regulatory board. *McEntee, supra*, at p 2. Therefore, the defendant arcade game owner was exempt from the MCPA claims. Appendix, pp 254a-256a.

Also, see generally, *Timmons v Devoll*, 2004 WL 345495 (Mich App, Feb. 24, 2004), lv den 471 Mich 906 (2004) (listing of home for sale is conduct specifically authorized under the laws administered by a regulatory board and, thus, exempt); *Love v Ciccarelli*, 2004 WL 981164 (Mich App, May 6, 2004) (role of real estate broker to list and

sell house was conduct exempt under the MCPA); *Gleason v Nexes Realty,* Inc, 2005 WL 3304117 (Mich App, December 6, 2006) (alleged failure of real estate broker to convey plaintiffs' purchase offer to the seller of a home was conduct that was exempt under the MCPA); *Lewis v First Alliance Mortgage Corp*, 2004 WL 1365997 (Mich App, June 17, 2004), lv den 472 Mich 894 (2005) (residential mortgage loan transactions by a licensed or registered mortgage lender are exempt from the MCPA); *Inge v Rock Financial Corp*, 2004 WL 1778819 (Mich App, Aug. 10, 2004) (residential mortgage loan transactions are "specifically authorized" under law administered by an officer acting with statutory authority of this State and are, therefore, exempt under the MCPA); *Dyer v Flagstar Bank FSB*, 2005 WL 177215 (Mich App, Jan. 27, 2005) (trial court properly denied plaintiff's motion to amend to add an MCPA claim where the amendment was futile because residential mortgage loan transactions are exempt under the MCPA); *Rush v MGM Grand Detroit, LLC*, 2005 WL 356307 (Mich App, Feb. 15, 2005), lv den 474 Mich 905 (2005) (alleged negligence of casino with respect to plaintiff's credit line held to be conduct that is exempt under the MCPA). See, Appendix, pp 257a-281a.

5. Public Policy Considerations Require Reversal Of The Court Of Appeals

It is in the interest of public policy to reverse the Court of Appeals and reinstate the decision of the trial court. Homeowners with complaints against residential builders may file a complaint with the Department. MCL 338.1551. After the filing of a complaint, the Department prosecutes the case free of charge to the homeowner and may, among other things, require a builder to appear for an investigative conference and/or require

a builder to appear and show cause why his/her license should not be revoked. MCL 338.1552 and MCL 338.1553(3). A formal complaint may be issued by the Department. At that point, the builder may elect to reach a settlement or resolution with the homeowner. However, the Department may (and does) nonetheless still proceed against the builder and may take disciplinary action, including the imposition of sanctions and the revocation of the builder's license. MCL 338.1553(3). The sanctions may include restitution. MCL 339.602.

The Daileys filed a complaint with the Department in addition to filing the present lawsuit. A formal complaint was issued by the Department against HEBC and Hartman. See, State of Michigan Formal Complaint, Appendix, pp 211a-228a. These events pose the potential for double liability for the same alleged conduct to the same parties and also the threat of inconsistent verdicts. From a public policy standpoint, there is simply no reason why residential builders, while engaged in regulated conduct, are not exempt under the MCPA. It is irrelevant that the proceeding against Hartman and HEBC was resolved without restitution. Restitution was not ordered, but only because this lawsuit was pending. See, Stipulation, ¶ 4, Appendix, pp 196a-199a. The Department could have awarded restitution. Again, the point is that Hartman, like so many builders and other regulated professionals, was sued by the same people, for the same thing, on two different forums and was subject to double liability/penalties.

B. As A Matter Of Law, Corporate Officers Of Licensed Builders Are Not Personally Liable For Claims Under The MCPA

1. Standard Of Review

The standard of review in this matter is de novo as it involves the interpretation and application of a statute. See, *McJunkin v Cellasto Plastic Corp*, 461 Mich 590, 596; 608 NW2d 57 (2000), citing *Lincoln v General Motors Corp*, 461 Mich 483, 489-490; 607 NW2d 73 (2000). An appellate court applies a de novo standard when reviewing motions for summary disposition, which test the factual support for a claim. MCR 2.116(C)(10); *Dressel v Ameribank*, 247 Mich App 133, 146; 635 NW2d 328 (2001), rev'd on other grounds 468 Mich 557 (2003).

2. There Is No Personal Liability Under The MCPA

In addition to both HEBC and Hartman being exempt under the MCPA, Hartman is not personally liable under the MCPA. As one of the Court of Appeals judges in the present case noted, the issue of whether an individual may be liable under the MCPA appears to be a question of first impression for a published decision in this State. See, 5/26/05 Opinion, pp 1-2, Appendix, pp 43a-44a. (Sawyer, J., concurring in part and dissenting in part).[8]

---

[8] In one unpublished decision, on facts very similar to this case, the Court of Appeals held that the president of a construction company was not personally liable under the MCPA notwithstanding that he signed the contract between the parties. The Court held that the individual acted only in his capacity as representative of the construction company. *Knobelspiesse v Wright Ventures, Inc,* 2002 WL 1308788, p 2 (Mich App, June 14, 2002), Appendix, pp 282a-286a.

a. Using Black Letter Law Statutory Construction Principles, There Is No Personal Liability Under The MCPA

When interpreting a statute, this Court turns first to the language of the statute itself to ascertain the Legislature's intent. *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 526; 697 NW2d 895 (2005). Here, the MCPA provides: "Unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce are unlawful . . . ." MCL 445.903(1) (emphasis supplied). Accordingly, in order to even state a claim under the MCPA, the plaintiff must prove that the defendant was engaged in "trade or commerce." The MCPA defines "[t]rade or commerce" as "the conduct of a *business* providing goods, property, or service primarily for personal, family, or household purposes . . . ." MCL 445.902(d) (emphasis supplied). Therefore, the MCPA speaks to the conduct of a business as one of its *prima facie* elements – not the conduct of an individual.

Hartman himself was not the *business* whose trade or commerce was involved here – HEBC was. See, *Dix v American Bankers Life Assurance Co of Fla*, 429 Mich 410, 417; 415 NW2d 206 (1987) (MCPA was enacted to protect consumers from "deceptive *business* practices"). Indeed, the types of transactions and parties covered by the MCPA clearly focus on the "trade or commerce" and the "business" involved, not the individual involved. MCL 445.902(d), 445.903(1). Therefore, by definition, the MCPA does not provide for individual monetary liability. To say otherwise is to render meaningless the definition of "trade or commerce" and to eliminate an entire component of a plaintiff's *prima facie* case – which is directly contrary to Michigan's laws of statutory construction. *People v Bonchard-Ruhland*, 460 Mich 278, 284; 597 NW2d 1 (1999) ("When construing a statute,

the court must presume that every word has some meaning and should avoid any construction that would render any part of the statute surplusage or nugatory.").

The majority opinion of the Court of Appeals does not rely on the definitions section of the MCPA, nor does the majority address the *prima facie* case element of "trade or commerce." Instead, the majority focuses on the statute of limitations provisions of the MCPA. That section of the MCPA provides:

> (7) An action under this section shall not be brought more than 6 years after the occurrence of the method, act, or practice which is the subject of the action nor more than 1 year after the last payment in a transaction involving the method, act, or practice which is the subject of the action, whichever period of time ends at a later date. However, when a **person** commences an action against another **person**, the defendant may assert, as a defense or counterclaim, any claim under this act arising out of the transaction on which the action is brought.

MCL 445.911(7). However, the majority's reliance upon this one provision of the MCPA is incorrect.

It is black letter law that, in resolving disputed interpretations of statutory language, it is the function of the reviewing court to effectuate the legislative intent and, where clear, enforce it as written. *Bonchard-Ruhland*, 460 Mich at 284. A review of the entire MCPA demonstrates that the Legislature was well aware of when it intended a certain provision to apply to an individual, and when it intended other provisions to apply only to corporations or other business entities.

First, the MCPA defines "person" to include any legal entity, including corporations and partnerships. MCL 445.902(c). By contrast, there is no definition of

"business" which includes "natural persons." MCL 445.911(2). Therefore, the term "person" can mean a corporate entity, partnership, limited liability company, etc. AND a natural person. However, the term "business" cannot. This distinction is particularly relevant when the remedies provisions of the MCPA are reviewed. As stated by Judge Sawyer:

> Further, the sections dealing with remedies also selectively establish remedies available against "a person." For example, MCL 445.905 authorizes the attorney general to seek a restraining order against "a person" who is violating MCL 445.903. The general remedy section, MCL 445.911, authorizes under paragraph (1) equitable relief against a person who violates MCL 445.903. But under paragraph (2), which provides for a financial recovery, there is no such language regarding the action being against "a person" who violates the act. The Legislature's use of both the terms "a business" (a specific term) and "a person" (a more general term) reflects an intentional distinction between the two and a very specific scheme by the Legislature: equitable relief against persons violating the act, but no financial damages against those individuals.
>
> Moreover, the majority's reliance on MCL 445.911(7) is misplaced for a number of reasons. First, as noted above, the MCPA defines "person" to include any legal entity, including corporations and partnerships. Therefore, the use of the word "person" in that subsection does not necessarily establish a remedy against an individual. Second, that subsection establishes a period of limitation to commence an action under the act and then provides that a *defendant* in a lawsuit may raise a claim under the act as a defense or counterclaim. But who would be suing the consumer that might have a claim under the MCPA? – The business with which the consumer contracted, not the individual employee who may have violated the act. Therefore, if anything, MCL 445.911(7) supports the view that financial damages under the act are recoverable against the business entity, not against the individual employee. Third, subsection (7) does not create a remedy. As discussed above, it is subsection (1) that creates

> a remedy against an individual, and that remedy is only equitable in nature.
>
> Accordingly, it is clear and unambiguous to me that the Legislature provided for equitable relief against the individual who actually is engaging in the conduct which violates the act in order to stop the conduct, while providing for financial remedies against the business which benefits from that conduct. Therefore, I believe that the trial court correctly concluded that there was no individual liability by Hartman and it properly granted summary disposition on the MCPA claim.

5/26/05 Opinion, pp 2-3 (Sawyer, J.), Appendix, pp 44a-45a.

Therefore, the mere use of the word "person" in the MCPA, standing alone, does not necessarily establish a money damages remedy against an individual. See, 5/26/05 Opinion, p 3 (Sawyer, J.), Appendix, p 45a. To the contrary, the few places in which the term "person" is used are unrelated to money damage claims and, thus, unrelated to the present case. See, e.g., MCL 445.905 (actions by the Attorney General against a person), MCL 445.911(1)(b) (actions for enjoining a person in equity). Instead, the operative portion of the MCPA which sets forth the monetary penalty of $250 and reasonable attorney fees does not indicate that the penalty is recoverable from a "person." Thus, the Legislature intended that a plaintiff proceed against an individual in equity, See, MCL 445.911(1) (equitable relief against a "person"), and against a business for monetary damages, See, MCL 445.911(2) (monetary relief against a "business"). 5/26/05 Opinion, p 3, Appendix, p 45a.

b. The Court Of Appeals' Reliance On Common Law Fraud Principles To Find Individual Liability Under The MCPA Is Misplaced

In addition, the Court of Appeals relied upon the following line of reasoning: (1) the MCPA violations have a common root in "fraud"; (2) torts are generally applicable to the individual tortfeasor; (3) therefore, the MCPA should also apply to the individual tortfeasor. However, the Court of Appeals' logic is flawed from its point of beginning.

First, there is simply nothing to indicate that, in enacting the MCPA, the Legislature intended to adopt common law fraud principles as the basis for interpreting its provisions. Therefore, the Court of Appeals' initial premise for its logic is unsupported as a matter of law. Moreover, the entire rationale breaks down in the face of Michigan black letter law that: (1) where an express contract exists, no tort action will lie where there is no duty separate and distinct from the contract; and (2) agents are not liable for contracts they make on behalf of disclosed principals. *Hall v Encyclopedia Britannica*, Inc, 325 Mich 35; 37 NW2d 702 (1949).

This Court has recently held that if there is an express *contract* in existence, and no duty independent of the contract has arisen, a tort action separate from the contract action may not lie. See, *Fultz v Union-Commerce Assoc*, 470 Mich 460, 467-8; 683 NW2d 587 (2004), citing, *Hart v Ludwig*, 347 Mich 559; 79 NW2d 895 (1956). **This is true even with regard to actions for fraudulent misrepresentation.** See, *Tempo, Inc v Rapid Electric Co*, 132 Mich App 93, 107; 347 NW2d 728 (1984); See also, *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 54, 57; 649 NW2d 783 (2002).

In *Tempo, supra*, the Court of Appeals held that to prevail on a fraudulent misrepresentation claim that is brought with a breach of contract claim, the fraud claim must be independent of the alleged breach of contract. The Court cautioned against the alleged fraudulent representation being "an essential ingredient of [the] breach of contract claim, and not independent thereof[.]" *Id*.

The Daileys' MCPA claim is not "independent" of their breach of contract claim (which continues to survive independent of this appeal) because one contains "an essential ingredient" of the other. See, *Tempo, supra*. Both claims allege that Hartman made changes to the original specifications without the Daileys' permission. Therefore, even under common law fraud principles, a tort action cannot lie against Hartman because it is duplicative of the contract claim, and the Daileys have failed to articulate a duty separate and distinct from that contract. See, *Fultz, supra*; *Sherman, supra*.

Furthermore, under agency principles, Hartman was an agent of the disclosed principal, HEBC. An agent of a disclosed principal is only personally liable if he acts outside the scope of his authority. See, *Brusslan v Larsen*, 6 Mich App 680; 150 NW2d 525 (1967), cited in *PM One, Ltd v Dep't of Treasury*, 240 Mich App 255, 266-267; 611 NW2d 318 (2000); See also, *Mickam v Joseph Louis Palace Trust*, 849 F Supp 516, 520 (ED Mich, 1994), recon grtd in part on other grounds 849 F Supp 516 (1994) (agent for title insurer could not be liable for breach of contract).

Hartman did not act outside the scope of his authority from HEBC. He simply entered into the contract with the Daileys on behalf of HEBC. Steven Dailey confirmed during his deposition that the Daileys' contract ". . . is with Hartman and Eichhorn Building

Company, Inc." See, Deposition of Steven Dailey, 10/4/02, p 155, Appendix, p 233a. The Building Agreement identifies the parties as being HEBC and Steven and Janine Dailey. See, Appendix, pp 202a-204a. The Project Specification Information for the Dailey renovation was prepared on HEBC stationery and has Hartman's signature as "Builder's Agent." See, Appendix, pp 206a-210a. The Daileys paid HEBC – not Hartman individually. See, Appendix, pp 128a-135a. As a result, Hartman cannot be personally liable under even common law fraud principles according to agency law because Hartman is the agent of the disclosed principal, HEBC. See, *Brusslan, supra*.

Finally, the Court of Appeals' reliance on the cases of *People v Brown*, 239 Mich App 735; 610 NW2d 234 (2000), and *Joy Management Co v City of Detroit*, 183 Mich App 334; 455 NW2d 55 (1990), is misplaced. Neither of these cases involved the undisputed factual situation here. *Joy Management Co* involved agents of a real estate management company being criminally prosecuted individually under an ordinance. There was no question of civil liability and, in fact, no contract at issue at all. *Joy Management Co*, 183 Mich App at 340. Similarly, *Brown* involved corporate officers being criminally prosecuted under the Michigan Builders' Trust Fund Act ("MBTFA") for the misappropriation of funds paid by a homeowner. In reaching this conclusion, the Court of Appeals relied on the provisions of MBTFA, stating:

> [w]hether the MBTFA encompasses officers of a corporate contractor who personally misappropriate funds is a question of statutory construction.

Brown, 239 Mich App at 739. Significantly, the case did not involve any question of civil liability, and the Court of Appeals did not hold that corporate officers were personally liable

notwithstanding the existence of a contract which covers the same subject matter as the tort claim.

In sum, the Court of Appeals incorrectly equated the MCPA with common law fraud. The two are not the same. If they were, there would be no need for the MCPA at all. Common law fraud involves a burden of proof and *prima facie* elements different from the MCPA. Compare, *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330; 247 NW2d 813 (1976) ("To constitute actionable fraud, it must appear; that defendant made material misrepresentation; that it was false; that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth, and as a positive assertion; that he made it with the intention that it should be acted upon by plaintiff; that plaintiff acted in reliance upon it; and that he thereby suffered injury") ("Fraud will not be presumed but must be proved by clear, satisfactory and convincing evidence"); and *Evans v Ameriquest Mortgage Co*, 2003 WL 734169 (Mich App, March 4, 2003), in which the Court of Appeals explained:

> In granting summary disposition in this case, the trial court summarily concluded that a claim under the MCPA was analogous to a claim of fraud and subject to the same analysis. We disagree. The MCPA prohibits the use of "unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce." MCL 445.903(1); *Zine, supra*. While a cause of action under the MCPA has similarities to a fraud claim, the MCPA captures more conduct within its sweep and offers greater protection to consumers. See *Dix v American Bankers Life Assurance Co*, 429 Mich. 410; 415 NW2d 206 (1987).
>
> Not all provisions of the MCPA require that a plaintiff establish each of the elements of fraud in order to be successful. Section 3 of the MCPA includes 33 separate

> "unfair, unconscionable or deceptive methods, acts or practices" sufficient to establish a violation of the statute, the majority of which are based on some form of misrepresentation. While a common law fraud claim based on misrepresentation requires that the plaintiff show reasonable reliance on misrepresentation, *Webb, supra*, only two of the MCPA's thirty-three "unfair, unconscionable, or deceptive methods, acts or practices" expressly require some form of reasonable reliance by the consumer. See M.C.L. § 445.903(1)(s) ("which fact could not be reasonably known by the consumer"), and (bb) ("a person reasonably believes").

Evans at p 3, Appendix, pp 287a-291a.

In short, the MCPA is not common law fraud – it is its own cause of action, statutorily created. Therefore, the Court of Appeals' reliance upon common law fraud principles to find personal liability under the MCPA was incorrect.

c. Policy Consideration Support Reversal Of The Court Of Appeals' Decision On Individual Liability Under The MCPA

The MCPA was designed to protect consumers from sophisticated commercial enterprises and their unfair practices in trade or commerce. See, *Newton v West*, 262 Mich App 434, 437-438; 686 NW2d 491 (2004); *Smolen v Dahlmann Apartments, Ltd*, 186 Mich App 292, 297; 463 NW2d 261 (1990).

Many consumers are financially unable to "take on" corporate defendants. Therefore, the MCPA provides for the payment of the successful complainant's attorney fees. MCL 445.911(2). See generally, *Jordan v Transnational Motors, Inc,* 212 Mich App 94, 97-99; 537 NW2d 471 (1995) ("One of the purposes behind . . . the MCPA is to provide, via an award of attorney fees, a means for consumers to protect their rights and obtain judgments where otherwise prohibited by monetary constraints."); see also, *Smolen, supra*, at 297. This

purpose behind the MCPA is lost if, however, the defendants are not corporations but merely the individual agents of the corporations. That is, the potential lack of financial resources that an MCPA plaintiff may have is equally true for an individual defendant in an MCPA action.

Most individuals, without corporate resources, cannot afford the attorney fees incurred in defending such an action. Yet, there is no mechanism under the MCPA by which a prevailing defendant can recover his attorney fees. Instead, the recovery of attorney fees is only possible by the prevailing plaintiff. MCL 445.911(2). Why? It was not intended that there be individual defendants on money damage claims and, therefore, no reason to provide a means for individual defendants to recover attorney fees if successful. Instead, the MCPA, through its attorney fees provision, allows individual plaintiffs access to the courts against corporate defendants that they might not otherwise be able to afford. This policy behind the MCPA favoring the individual should apply equally to individual consumers and individual defendants who were merely acting on behalf of their commercial employer.

d. Other States Have Refused To Impose Personal Liability Under Their Respective Consumer Protection Acts

Other states have reached the same result. For example, in *Menetti v Chavers*, 974 SW2d 168 (Ct App Tex, 1998), the Texas Court of Appeals dismissed claims filed by homeowners against their construction company and its shareholders for fraud and violations of Texas' Deceptive Trade Practices Act, stating:

> In the case before the court, both contract and tort claims have been brought against the Menettis. Whether a showing of actual fraud is required to pierce the corporate veil in this case

> is, we believe, a question of some difficulty. However, after surveying the case law and the legislation, which seem to be somewhat at odds on the entire issue of corporate-veil piercing, we conclude that the claims before us do relate to or arise from a contractual obligation and therefore fall under the amended article 2.21. Thus, the Chaverses were required to demonstrate actual fraud to pierce the corporate veil and hold the Menettis individually liable. We are persuaded that this is the correct course because we believe the traditional concerns of tort cases, that the parties have not encountered each other voluntarily, do not apply here, where the Menettis and the Chaverses did in fact enter a bargain knowingly.

Menetti, 974 SW2d at 174 (citations omitted). See also, *Int'l Ultimate Inc v St. Paul Fire & Marine Ins Co*, 122 Wash App 736, 757-758; 87 P3d 774 (2004), lv den 153 Wash 2d 1016 (2004) (insurance adjuster was not personally liable on negligence, bad faith, and consumer protection act claims because the contractual relationship was with the company, not the adjuster); see also, *Chase v Dorais*, 122 NH 600; 448 A2d 390 (1982) (car buyer had no consumer protection action against individual seller for defective car); *Lantner v Carson*, 374 Mass 606; 373 NE2d 973 (1978) (home buyers had no consumer protection action against individual seller for defective home).[9]

Similarly, Michigan has a long history of respecting and upholding the corporate form as it is designed to shield individuals from civil liability. See, *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 456; 559 NW2d 379 (1996), lv den 454 Mich 895 (1997). At the very least, an exception to personal liability under the MCPA is the existence of a corporate form. See, e.g., *Keyes v Jackson Housing Center, Inc*, 1999 WL 33440947, p 4 (Mich App, June 25, 1999) (corporate veil of pre-fab home manufacturer

---

[9] Copies of these out-of-state opinions are located at Appendix, pp 292a-324a.

would not be pierced to hold individuals liable on MCPA and contract claims). Appendix, pp 325a-328a. This Court should not ignore the corporate form of HEBC and hold its officer, Hartman, personally liable under the MCPA. By any theory of liability, the MCPA does not impose liability on individual residential contractors.

IV. CONCLUSION AND RELIEF REQUESTED

For all the foregoing reasons, Third-Party Defendant/Appellant, Jeffry R. Hartman, respectfully requests that this Court reverse the Court of Appeals and reinstate the trial court's grant of summary disposition in his favor.

ROBERT S. ROLLINGER, P.C.
Attorney for Plaintiff/Counterdefendant and Third-Party Defendant/Appellant, Jeffry Hartman

Date:_____, 2006 By:_____

Robert S. Rollinger (P27237)
30500 Northwestern Hwy., Ste. 500
Farmington Hills, MI 48334
(248) 626-1133

G:\docs\1000\C1029\M086\Supreme Court\Appeal Brief-Hartman.wpd